



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

COP/172126

PRELIMINARY RECITALS

Pursuant to a petition filed February 18, 2016, under Wis. Stat. § 46.27(7m), Wis. Stat. § 227.42 and Wis. Admin. Code § HA 3.03(1), to review a decision by the Oneida County Department of Social Services in regard to a Medical Assistance (MA) – related program, a hearing was held on April 13, 2016, at Rhinelander, Wisconsin.

The issue for determination is whether the agency correctly determined that the petitioner is no longer eligible for an MA waiver program, due to lack of functional eligibility (“level of care”).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED], case mgr.

Oneida County Department of Social Services
Oneida Avenue
PO Box 400
Rhinelander, WI 54501

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Oneida County. She is eligible for MA.

2. The petitioner was an ongoing recipient of services paid by COP-W, which is an MA home and community-based waiver program. The petitioner's case underwent an annual review in January 2016. On January 19, 2016, the agency issued written notice to the petitioner advising that her COP-W eligibility would be discontinued effective February 8, 2016. The basis for discontinuance was failure to meet the institutional level of care requirement.
3. The petitioner, age 68, has diagnoses of osteoarthritis, degenerative joint disease, COPD, GERD, anemia due to malabsorption, chronic back pain, lower extremity peripheral neuropathy, stage III kidney disease, anxiety, depression, and history of bariatric surgery, cervical, and lumbar spine surgeries. She is not developmentally disabled. The petitioner's condition improved over the course of the last year.
4. The petitioner is able to independently perform the following activities of daily living (ADLs): dressing, eating, toileting, in-home ambulation, and transferring. She requires physical help with bathing, due to pain, numbness and loss of balance. The January 2016 assessor determined that the petitioner is independent in all ADLs, including bathing.
5. The petitioner is able to independently perform the following instrumental activities of daily living: medication administration, money management, and telephone use. She does require weekly help with grocery shopping, laundry/chores. She does not drive due to numbness in her legs, and needs help with meal preparation. The petitioner does not require overnight care/supervision, has adequate communication skills and cognition, has no obvious memory impairment, is not physically resistive to care, does not wander, does not exhibit self-injurious behaviors, is not violent toward others, and does not abuse drugs.
6. The assessor scored the petitioner as only needing help with the IADLs of grocery shopping and laundry/chores in January 2016.

DISCUSSION

The MA Community Waiver Programs (e.g., Community Integration Program, Community Options Program - Waiver) are partially funded by the federal government through the Medical Assistance (MA) program. These Waiver programs must meet federal requirements, including MA regulations when applicable. To receive services through the Waiver programs, a person must be currently eligible for MA, have institutional-level care needs, and be elderly or disabled. *Medicaid Eligibility Handbook (MEH)*, §28.1, and the *MA Home and Community-based Services Waivers Manual (Manual)*, at <https://www.dhs.wisconsin.gov/waivermanual/index.htm>.

To meet the functional eligibility requirement (*i.e.*, to have institutional-level care needs), a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. *Manual*, §2.07; 42 C.F.R. §§ 435.217 & 435.441.301(b). To be found or remain eligible, the applicant must undergo an assessment of his/her needs and functioning. At hearing, an applicant has the burden of proof. For a case involving an ongoing recipient, the agency has the burden (preponderance of the credible evidence).

I. THE DHS COMPUTERIZED SCREENING TOOL DETERMINED THAT THE PETITIONER IS NOT FUNCTIONALLY ELIGIBLE AT THE "NURSING HOME CARE LEVEL."

The Wisconsin Department of Health Services has made efforts to improve the statewide efficacy of functional/LOC assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener who has experience working with long term care consumers. This screener asks the applicant, or a recipient at a periodic review, questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits the

“Functional Screen Report” to the Department’s Division of Long Term Care. The Department runs the Long Term Functional Screen data (or “tool”) through a computer program to see if the applicant/recipient meets any of the nursing levels of care. The tool is designed to incorporate the skeletal definitions from the federal Medicaid rules for Nursing Care and institutional Developmental Disability facilities.

The petitioner’s diagnoses are not in dispute. The agency assessor determined in January 2016 that the petitioner needed no ADL assistance, and only weekly help with two IADLs. When the petitioner’s functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

The petitioner disagrees with the assessor’s characterization of her current bathing help needs. Given the petitioner’s diagnoses, the petitioner’s assertion that she needs help in and out of a slippery shower is credible. I therefore found that she needs help with bathing. Relying on the testimony of the agency’s two eyewitnesses, I was not persuaded that the petitioner needs physical in-home ambulation help. She also stressed her need for help with household chores, meal preparation, grocery shopping, housekeeping/laundry, and transportation. Because this Judge would change the tool scoring by adding bathing as an ADL requiring physical assistance, the automated screening result from January cannot be relied upon here.

II. THE INSTITUTIONAL LEVEL OF CARE REQUIREMENT.

The petitioner argues that she has care needs, due to her back pain and numbness, which make the continuation of MA Waiver program benefits necessary for her. In particular, she argues that she needs help with bathing, mobility, meal preparation, grocery shopping, housekeeping/laundry, and transportation.

Looking at legal definitions, rather than the computer program result, federal law requires that a person have care needs at an institutional level (hospital, nursing home) as a condition of adult MA Waiver eligibility. The petitioner does not appear to be arguing that she has regular care needs that require hospitalization. Federal law defines a nursing facility as follows:

(a) *Nursing Facility Defined.*—In this title, the term “nursing facility” means an institution (or a distinct part of an institution) which—

(1) is primarily engaged in providing to residents—

(A) skilled nursing care and related services for residents who require medical or nursing care,

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or

(C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities,

and is not primarily for the care and treatment of mental diseases;

42 U.S.C. 1396r(a). There is no question that the petitioner does not currently require “skilled” nursing care in her home, per (A) above. *See*, Wis. Admin. Code, § DHS 132.13(10), (31). Rehabilitation services (*e.g.*, physical therapy) are not being regularly received in this case, per the record before me. Of particular note is the requirement that a resident must need a health-related service above the level of

room and board. Because housekeeping services are a “room and board” item, rather than a health-related service, the need for housekeeping and meal preparation services alone cannot qualify a person for the COP- Waiver. In this case, the petitioner needs help with one ADL (bathing), which elevates her services above the mere “room and board” level.

Because I have concluded that a change in the screen scoring is required, this matter will be remanded to the agency to re-submit the screen with changed scoring. My suspicion is that the change will not be enough to result in a finding of eligibility for the petitioner. Typically, the screening tool results match the functional eligibility requirements for another MA-related program, Family Care. The Family Care code section on functional eligibility concludes that a person is eligible for that program (which is similar to COP-W) if she requires physical help with (1) at least three ADLs, *or* (2) two ADLS plus at least one IADL, *or* (3) needs help with five IADLS. Wis. Admin. Code § DHS 10.33(2). The Family Care program also uses a computerized long term care functional screening tool to determine eligibility. Because the petitioner needs help with only one ADL and less than five IADLS (*e.g.*, she can manage her money and use a telephone), I believe that she will not be found functionally eligible.

Nonetheless, I am willing to give the petitioner the benefit of having the screen re-run with adjusted scoring. This matter will be remanded to the agency with instructions to re-run the screening after adjusting the bathing score to reflect the need for physical help with that task (a “2” score). For IADLS, the scoring for meal preparation should be adjusted to reflect the need for (a) cooking help daily [“2” score] and (b) transportation assistance [“2” score].

CONCLUSIONS OF LAW

1. The petitioner’s January 2016 assessment must be re-scored to reflect her need for (1) physical bathing assistance, (2) meal preparation daily, and (3) transportation help.
2. In all other respects, the January 2016 assessment was correctly scored.

THEREFORE, it is

ORDERED

That the petition is remanded to the agency with instructions to re-score the petitioner’s functional screen in accord with Conclusion of Law #1 within 10 days of the date of this Decision, and to promptly report the result of the re-screening to her thereafter. In all other respects, the petition is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be *received within 20 days after the date of this decision*. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 *and* to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

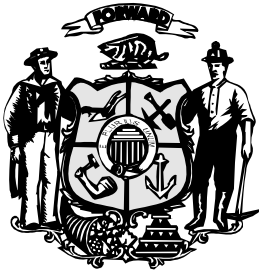
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 31st day of May, 2016

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on June 1, 2016.

Oneida County Department of Social Services
Bureau of Long-Term Support
[REDACTED]